Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–563 OF 1995
NH CHAN, AHMAD FAIRUZ AND MOKHTAR SIDIN JCA
9 OCTOBER 2003

Contract — Damages — Ascertainment — Breach of tenancy agreement — Loss of profits — Whether assessment by Inland Revenue Board sufficient

Contract — Damages — Ascertainment — Breach of tenancy agreement — Loss of profits — General and special damages — Whether duty to mitigate losses

The respondent entered into a written tenancy agreement with the appellants but failed to hand over vacant possession of the property to the respondent after executing the tenancy agreement. The tenancy agreement executed was for a period of three years, ie from 1 October 1991 to 31 October 1994. On 25 June 1993, the respondent filed an application seeking to repudiate the tenancy agreement. The learned judge allowed the application and ordered the assessments be made before the senior assistant registrar ('SAR'). The SAR awarded general damages to the amount of RM97,200 for loss of profit and special damages to the amount of RM17,200. For the general damages, the SAR admitted the assessments by the Inland Revenue Department in respect of the respondent's income for the years of assessment 1991, 1992 and 1993 as loss of profits based on the income stated in those assessments. The SAR further topped them up with 20% as the respondent expected his business profits to increase by 20% because of the location of the said premise. The appellants being dissatisfied with the awards made by the SAR appealed to the judge. The judge dismissed the appeal against the award for general damages but allowed the award on special damages. Being dissatisfied with that decision, the appellants appealed.

Held, allowing the appeal by the appellants in respect of general damages and reinstating the award on special damages:

(1) The SAR had erred in making the award based on those assessments alone. The assessments should not have been admitted at all. The assessments were in respect of the personal income and not the respondent's income from his business of selling clothes. There is nothing to relate the income stated therein with the respondent's income of his business of selling clothes' except for the respondent's words. Other evidence must be adduced to show that income stated in those assessments were income from his business of selling clothes (see paras 14, 20).

(2) Furthermore, those assessments should not have been admitted in that the income shown in those assessments were not income for the years stated in those assessments (see para 15).

(3) The SAR had erred when he added 20% to the income stated in those assessments. There was no evidence to support the claim that the respondent's business would increase by 20% if he moved to the said

premise. The only evidence was the location of the said premise was more favourable. There was no evidence to show it was so (see para 17).

(4) The respondent could have minimized his losses if he had taken steps to terminate the agreement as soon as it was made known to him that the premise was not available, which was soon after signing the agreement. Instead, he waited for a year and then claimed for loss of profits for three years. He was not entitled to do that (see para 23).

(5) As for special damages, the SAR did not commit any error in awarding RM17,200 as special damages. There was no reason given by the learned judge in dismissing this award. Hence, the learned judge had erred in disallowing the award on special damages (see para 28).

Obiter:

In a claim for damages for breach under a contract, a person who suffered from the breach could claim either damages for loss of profits (general damages) or the damages in preparation of the performance of the contract or wasted expenditure (special damages). He could not get both but would be entitled to only one. The record did not show any election made by the respondent in the court below, although it is of no consequence in this appeal (see paras 30–31).

[**Bahasa Malaysia summary**

Responden telah memasuki satu perjanjian sewa bertulis dengan perayu-perayu tetapi gagal untuk menyerahkan milikan kosong hartanah kepada responden selepas memasuki perjanjian sewa tersebut. Perjanjian sewa yang disempurnakan adalah untuk tempoh tiga tahun, iaitu dari bulan Oktober 1991 hingga 31 Oktober 1994. Pada 25 Jun 1993, responden telah memfailkan satu permohonan untuk memohon pembatalan perjanjian sewa tersebut. Hakim yang bijaksana telah membenarkan permohonan tersebut dan memerintahkan penaksiran dibuat di hadapan penolong kanan pendaftar ('PKP'). PKP telah mengawardkan ganti rugi am sejumlah RM97,200 untuk kerugian untung dan ganti rugi khas sejumlah RM17,200. Bagi ganti rugi am, PKP telah menerima penaksiran-penaksiran oleh Jabatan Hasil Dalam Negeri berkaitan pendapatan responden bagi tahun-tahun taksiran 1991, 1992 dan 1993 sebagai kerugian untung yang dinyatakan dalam penaksiran-penaksiran tersebut. PKP seterusnya telah menambah 20% lagi kerana responden telah menjangkakan keuntungan perniagaannya meningkat sebanyak 20% kerana lokasi premis tersebut. Perayu-perayu yang berasa tidak puas hati dengan award-award yang dibuat oleh PKP telah merayu kepada hakim. Hakim telah menolak rayuan tersebut terhadap award untuk ganti rugi am tetapi membenarkan award untuk ganti rugi khas. Berasa tidak puas hati dengan keputusan tersebut, perayu-perayu telah merayu.

Diputuskan, membenarkan rayuan oleh perayu-perayu berkaitan ganti rugi am dan mengekalkan award untuk ganti rugi khas:

(1) PKP telah terkhilaf semasa membuat award berdasarkan penaksiran-penaksiran tersebut semata-mata. Penaksiran-penaksiran tersebut tidak

sepatutnya diterima langsung. Penaksiran-penaksiran tersebut adalah berkaitan pendapatan peribadi dan bukan pendapatan responden daripada perniagaan beliau menjual pakaian. Tiada apa-apa yang mengaitkan pendapatan yang dinyatakan dengan pendapatan perniagaan responden menjual pakaian kecuali kata-kata responden. Keterangan lain perlu dikemukakan untuk menunjukkan bahawa pendapatan yang dinyatakan dalam penaksiran-penaksiran tersebut adalah pendapatan daripada peniagaan beliau menjual pakaian (lihat perenggan-perenggan 14, 20).

(2) Tambahan pula, penaksiran-penaksiran tersebut tidak sepatutnya diterima kerana pendapatan yang ditunjukkan dalam penaksiran-penaksiran tersebut bukan pendapatan untuk tahun-tahun yang dinyatakan dalam penaksiran-penaksiran tersebut (lihat perenggan 15).

(3) PKP telah terkhilaf apabila menambah 20% kepada pendapatan yang dinyatakan dalam penaksiran-penaksiran tersebut. Tiada keterangan untuk menyokong tuntutan tersebut bahawa perniagaan responden akan meningkata sebanyak 20% jika beliau pindah ke premis tersebut. Satu-satunya keterangan adalah lokasi permis tersebut adalah lebih baik. Tiada keterangan untuk menunjukkan ia adalah begitu (lihat perenggan 17).

(4) Responden boleh mengurangkan kerugiannya jika beliau telah mengambil langkah-langkah untuk menamatkan perjanjian tersebut sejurus selepas mengetahui bahawa premis tersebut tidak dapat diperolehi, iaitu sejurus selepas perjanjian tersebut ditandatangani. Sebaliknya, beliau menunggu setahun dan kemudian menuntut kerugian untung untuk tiga tahun. Beliau tidak berhak berbuat demikian (lihat perenggan 23).

(5) Berhubung ganti rugi khas, PKP tidak melakukan kesilapan semasa mengawardkan RM17,200 untuk ganti rugi khas. Tiada sebab diberikan oleh hakim yang bijaksana menolak award tersebut. Justeru itu, hakim yang bijaksana telah terkhilaf kerana menolak award untuk ganti rugi khas tersebut (lihat perenggan 28).

Obiter:

Dalam satu tuntutan untuk ganti rugi kerana perlanggaran di bawah kontrak, seseorang yang mengalami kerugian akibat perlanggaran boleh menuntut sama ada ganti rugi untuk kerugian untung (ganti rugi am) atau ganti rugi dalam menyediakan pelaksanaan kontrak atau perbelanjaan yang rugi (ganti rugi khas). Beliau tidak boleh mendapat kedua-duanya tetapi hanya berhak kepada satu sahaja. Rekod tidak menunjukkan apa-apa pilihan oleh responden di mahkamah bawahan, walaupun ia tiada kaitan dalam rayuan ini (lihat perenggan-perenggan 30–31).]

Notes

For cases on ascertainment of damages in contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2836.

Cases referred to

Anglia Television v Reed [1971] 3 All ER 690 (refd)
Ismail v Haji Taib [1972] 1 MLJ 259 (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)
Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd [1988] 2 MLJ 672 (refd)
Toeh Kee Keong v Tambun Mining Co Ltd [1968] 1 MLJ 39 (refd)

Legislation referred to

Contracts Act 1950 s 74
Income Tax Act 1967 s 20

Appeal from: Civil Suit No 22–173 of 1993 (High Court, Pulau Pinang)

Walter BC Teoh (Saw & Teoh) for the appellants.
Cheah Choo Kheng (Karpal Singh & Co) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court):

[1] The respondent entered into a written tenancy agreement with theappellants but failed to hand over vacant possession of the property to the respondent after executing the tenancy agreement. The tenancy agreement executed was for a period of three years, ie from 1 October 1991 to 31 October 1994 in respect of premise No 209, Jalan Pasar, Bukit Mertajam, Province Wellesley ('the said premise'). On 25 June 1993, the respondent filed an application by way of surnmons in chambers seeking to repudiate the tenancy agreement. The prayers prayed for as stated in the summons in chambers were:

(a) bahawa perjanjian sewa bertarikh 1 Oktober 1991 di antara plaintif dan defendan-defendan dibatalkan (rescinded);

(b) wang cengkeram sebanyak RM17,500 dikembalikan oleh defendan-defendan kepada plaintif;

(c) defendan-defendan membayar kepada plaintif ganti rugi dan kerugian dengan faedah yang ditaksirkan oleh penolong kanan pendaftar;

(d) kos.

[2] On 15 September 1993, the learned judge allowed the application and ordered the assessments be made before the senior assistant registrar ('SAR'). The present appeal is only in respect of the assessments by the SAR.

[3] On 15 October 1994, the SAR made the following awards:

(a) RM97,200 as general damages for loss of profit; and

(b) RM17,200 as special damages for the purchase of furniture and mannequins.

[4] The appellants being dissatisfied with the awards made by the SAR appealed to the judge. The judge dismissed the appeal against the award for

general damages but allowed the award on special damages. Being dissatisfied with that decision, the appellants appealed to this court. We have given our decision earlier whereby we allowed the appeal by the appellants in respect of general damages and reinstated the award on special damages in the sum of RM17,200. In other words, the award of RM97,200 as general damages by the SAR was set aside while the award of RM17,200 as special damages by the SAR was reinstated and affirmed.

[5] Now we give our reasons for doing so.

[6] Before us, the learned counsel for the appellants submitted that the tenancy agreement ('the agreement') was a non-performance agreement. From the very beginning, immediately after the execution of the agreement, it was made known to the parties that the appellants were unable to deliver vacant possession of the premise stated in the agreement. The reason being the previous tenant refused to deliver vacant possession to the appellants and continued to occupy the said premise. Despite the fact that it was being made known to the respondent, the respondent insisted and demanded vacant possession of the premise by a letter from his solicitors dated 8November 1991. It was not disputed that when the appellants failed to deliver vacant possession the respondent did not take any action to repudiate the agreement. Despite being informed by the appellants that they had difficulties in delivering vacant possession, the respondent attempted to pay the monthly rents which the appellants refused to accept. The situation remained the same until October 1992 (about a year later) when the respondent sprang into action and issued a notice to terminate the agreement. The notice to terminate was followed by the filing of the writ and the statement of claim. The appellants admitted liability when the respondent filed a summons in chambers stated earlier resulting with an order dated 15 September 1993 ordering that the assessment of damages to be done before the SAR.

[7] At the hearing of the assessment of damages, the respondent claimed:

(a) loss of profits from 1 November 1991 to 31 October 1994 (the life span of the agreement) as general damages; and

(b) money expended for the purchase of furniture and mannequins in preparation of carrying on business at the said premise as special damages.

[8] The claim by the respondent was in accordance with s 74 of the Contracts Act 1950. The operation of this was explained by Ong Hock Thye FJ (as he was then) in *Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39, where at p 40 he stated:

> … Section 74(1) of the Contracts (Malay States) Ordinance 1950, is the statutory enunciation of the rule in *Hadley v Baxendale* (1854) 9 Exch 341. This section reads:
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> 'When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract to be likely to result from the breach of it.'

The rule lays down the main principles as follows:

> 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

In more compendious terms the rule has been restated by Asquith LJ in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 in a passage which I shall quote in full:

> '(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v Chicoutimi Pulp Co* [1911] AC 301), This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,
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> (2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.
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> (3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.
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> (4) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in *Hadley v Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary courses of things", of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.
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> (5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *Monarch Steamship Co Ltd* v *Karlshamns Oljefadbnker (A/B*) [1949] AC 196.
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> (6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge that defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at p 158, if the loss (or some factor without which it would not have occurred) is a "serious possibility" or a "real danger". For short, we have used the word "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy.'

[9] As to what sort of damages the respondent is entitled to, we would like to quote the words of Lord Denning MR in *Anglia Television v Reed* [1971] 3 All ER 690 which was cited by Suffian FJ (as he was then) in *Ismail v Haji Taib* [1972] 1 MLJ 259 at p 260. Lord Denning MR said:

> ... It seems to me that a plaintiff in such a case as this had an election; he can either claim for his loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits — or if he cannot prove what his profits would have been he can claim in the alternative the expenditure which has been thrown away, that is, wasted by reason of the breach. That is shown by *Cullmane v Britist 'Rema' Manufacturing Co Ltd* [1953] 2 All ER 1261, 1264,1265; [1954] 1 QB 292, at 303, 308.

[10] The burden of proving the damages is always on the parties claiming the damages. In *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672 at p 680, Edgar Joseph Jr J (as he was then) said:

> This brings to my mind the famous words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel* (1948) 64 TLR 177:
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> > 'Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: This is what I have lost, I ask you to give me these damages'. They have to prove it.'
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> Thus, in *Ashcroft v Curtin* [1971] 1 WLR 1731, a plaintiff claiming for diminution in the profits of his one man business could not succeed in this claim though the evidence pointed to a decrease in profitability which "was due to the injury, the records kept being too rudimentary and the accounts too unreliable to quantify the loss.

[11] In *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p 367, Edgar Joseph Jr J said:

> I now turn to consider the crucial question; have the plaintiffs proved their claim for damages as alleged or at all? With regard to this part of the case, I would preface what I have to say by referring to certain well-established principles.
>
> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v* William 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon* v *Deveridge* (1825) 2 C&P 109; 172 ER 50 and *Twyman v Knowles* 138 ER 1183.

[12] That is the burden of proof imposed on the respondent in order to succeed in his claim for damages. Let us now turn to the evidence as found by the SAR.

Loss of profits (general damages)

[13] Under this claim, the SAR awarded the sum of RM97,200 and the learned judge affirmed the award. In his evidence before the SAR, the

respondent stated that he intended to use the said premise for his business of selling clothes. He gave evidence that before and at the time of signing the agreement he was carrying on the same business at a shop on another street not far from the said premise. He added that it was his intention to move his business from that shop to the said premise where he expected his business profits to increase by 20% because of the location of the said premise. He claimed that the location of the said premise was more favourable than the shop that he was occupying. Though the appellants did not deny this, no other evidence was adduced to prove this. To support his claim for loss of profits, the respondent tendered the assessments by the Inland Revenue Department in respect of his income for the years of assessment 1991, 1992 and 1993. The SAR admitted those assessments as evidence despite the objection by the appellants. The SAR then awarded the sum of RM97,200 as loss of profits based on the income stated in those assessments and topped them up with 20%.

[14] We are of the view that the SAR had erred in making the award based on those assessments alone. First of all, we are of the opinion that those assessments should not have been admitted at all. Looking at those assessments, it is clear to us that the assessments were in respect of the personal income and not his income from his business of selling clothes. There is nothing to relate the income stated therein with the income of his business of selling clothes' except for the respondent's words. The appellants' counsel was correct in pointing out to the court that the income as stated in the assessments was his income from all sources such as dividends, interests, rentals, etc and not from the business of selling clothes alone. It is for the respondent to prove that the income stated in those assessments was the income from his business of selling clothes. This could be done by producing the return forms submitted to the Inland Revenue Department upon which those assessments were raised. The return forms would show the source of income. Alternatively, as suggested by the appellants' counsel, he could produce the accounts books of his business of selling clothes. The respondent failed to do this and as such had not discharged the burden on him.

[15] Another reason why we are of the view that those assessments should not have been admitted is that the income shown in those assessments werenot income for the years stated in those assessments. Section 20 of theIncome Tax Act 1967 (before it was amended by the Income Tax (Amendment) Act 1999) provides:

> 20 Basis years
>
> For the purposes of this Act, the calendar year immediately proceeding a year of assessment shall constitute the basis year for that year of assessment.

[16] In other words, the assessment for the year of assessment 1991 refers to the actual income of the respondent for the year 1990. As such, the SAR was wrong to take the income stated in the year of assessment 1991 as the income of the respondent for the year 1991, and this is also true for those assessments for the years 1992 and 1993. The income shown in those assessments were for the actual income of the respondent for the previous

years. The SAR had erred in taking the income shown in those assessments as the income of the respondent for those years. The basis of the SAR's award was totally wrong. As such, the award by the SAR could not be sustained.

[17] We are also of the view that the SAR had erred when he added 20% to the income stated in those assessments. First of all, there was no evidence to support the claim that the respondent's business would increase by 20% if he moved to the said premise. The only evidence was the location of the said premise was more favourable. There was no evidence to show it was so. Mere assertion is not evidence, what more when the figure arrived at was 20%. It is for the respondent to prove that the business of his would increase by 20% if he moved to the said premise.

[18] We would refer to *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* where the claim and the evidence produced were somewhat similar to the present appeal. Edgar Joseph Jr J at p 367 said:

> On the question of the quality of evidence expected of a plaintiff, it is well to remember what Devlin J said in *Biggin v Permanite* [1951] 1 KB 422 at p 438, namely, 'where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof' (see *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788 at p 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* [1971] 1 WLR 1731 in which the plaintiff claiming for diminution of profits of his one-man-business failed in his claim; even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the court will expect precise evidence to be given (see para 345 *McGregor on Damages* (15th Ed)).
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> It is with the above principles in mind that I turn to examine the evidence adduced by the plaintiffs to determine if they have proved the fact of damage and its amount.
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> The main witness called by the plaintiffs on this important issue of the quantum of damages was Mr Patrick So, a chartered accountant and partner of the firm of Richter, Usher & Vingberg, internationally known as Clark Kenneth Laventhal, the auditors and accountants of the plaintiffs.

[19] Further down at pp 368 and 369 his Lordship said:

> I must now proceed to evaluate the testimony of this witness. It is an elementary rule, often overlooked with resulting confusion and possible injustice that cases are decided on evidence; that means, of course, evidence that is admissible in law and relevant to the issues arising for decision.
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> Now, it was alleged by the plaintiffs that both the oral testimony of the accountant Mr So (regarding their financial operations) and the statement P76 prepared by him, were based upon the results of his examination of the accounts books of the plaintiffs for the relevant period. However, the accounts books themselves were never produced and the defendants never dispensed with formal

proof of the loss of profits alleged or at all. In my opinion, the result of this glaring omission, was to render such oral evidence of Mr So and P76 inadmissible in evidence and it makes not the slightest difference that Mr and Mrs Segal confirmed the accuracy of P76. I take the law on this point to be correctly stated by the Vice-Chancellor in *Johnson v Kershaw* 63 ER 1059, In that case, the evidence of an accountant was tendered containing the results of his examination of certain partnership books, but the accounts books themselves upon which he based his statement were not in evidence. The Vice-Chancellor said:

> 'If the account books had been in evidence, the accountant's statement of the results of his examination of those books, as the evidence of a person of skill, might be receivable; but, inasmuch as the books were not in evidence, I must decline to receive the deposition of Mr Peet as to their contents.'

That case commended itself to Dixon J (as he then was) in *Potts v Miller* (1940) 64 CLR 282 at p 303.

Nor, does it make any difference that counsel for the defendants never called for production of the accounts books, since the defendants never agreed to dispense with formal and proper proof of the loss of profits (see *Guan Soon Tin Mining Co v Ampang Estate Ltd* [1973] 1 MLJ 25 at p 30).

Indeed, a consideration of the relevant provisions of our Evidence Act 1950 (Rev 1974) leads irresistibly to the same conclusion, as I shall now attempt to demonstrate. It is a firmly established rule (to which there are exceptions) requiring that when documentary evidence is tendered, primary evidence of the document, that is to say the production of the document itself is essential (see s 64 of the Evidence Act).

The exceptions to the rule are also well-established and specifically provided for (see s 65(1) of the Evidence Act). Equally clearly, the burden of proving the existence of any circumstances bringing the case within any of these exceptions lies upon the party seeking to adduce secondary evidence of the contents of the document (see s 104 illus (b) of the Evidence Act).

In the present case, the plaintiffs made not the slightest attempt to discharge that burden, with the result that P76 which was alleged to be extracted from the books of accounts of the plaintiffs, which were never produced, was inadmissible in evidence. Similarly, the oral evidence of the accountant Mr So, which was based on P76, was also inadmissible for the same reason.

It is true that counsel for the defendants did not object to the admissibility of P76 or the oral evidence thereon of the accountant Mr So. But, to quote Masodkar J in *Sanjay Cotton Co v Omprakash* AIR 1973 Bom 40 at p 43:

> '... Here what one finds is that the learned counsel merely said that he has no objection to exhibit the documents ... If that be so, it is neither an admission as to the documents nor can be treated as an admission of the contents thereof.'

Moreover, it is settled law that inadmissible evidence does not become admissible simply be reason of failure to object. If any authority is needed for this proposition I would refer to the following passage in Sarkar, *Laws of Evidence* (13th Ed) at p 51 applied by Lee Hun Hoe CJ (Borneo) in *Malaysia National Insurance Sdn Bhd* v *Malaysia Rubber Development Corporation* [1986] 2 MLJ 124 at p 127:

> 'An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the court to exclude all

irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties …'

Without the evidence of the accountant Mr So as to the financial operations of the plaintiffs and without P76, there was still the general and slender testimony of Mr and Mrs Segal, but this testimony suffers from the same defects as to non-production of the accounts books hereinbefore mentioned and therefore does not, in my opinion, prove the damages claimed sufficiently or at all.

I would go further and say that even had the accounts books been in evidence they could not by themselves have been sufficient to charge the defendants with liability having regard to the provisions of s 34 of the Evidence Act so that the entries themselves would have had to be proved by someone having personal knowledge of the transactions reflected in such entries. The accountant and auditor Mr So, despite what he might say, was not such a person as he, like any accountant, would of necessity have to rely upon information derived from documentary sources and explanations provided by his clients when preparing the accounts. To emphasize the point I would add that it is common knowledge that when accountants prepare accounts for their clients for submission to the Inland Revenue Department they so certify in the accounts."

[20] Similarly, in the present appeal the production of the assessments alone should not be allowed. Other evidence must be adduced to show that income stated in those assessments were income from his business of selling clothes. What is more important, there was nothing to show that his business would increase by 20% if the respondent moved to the said premise. We are of the view that the respondent failed to prove his loss of profit.

[21] We have taken note the agreement was a non-performance agreement. It was not disputed that the respondent never moved into the said premise, what more to carry on his business therefrom. The agreement was never exhibited. As such, we take it that the agreement was the normal tenancy agreement whereby the appellants let the shophouse to the respondent and what sort of business to be carried out would not be stated in that agreement. As such, there was no evidence to show that the respondent would carry on the business of selling clothes there except his declaration of his intention to do so. As such, the basis of his claim of loss of business of selling clothes could not be upheld. In our view, the appellants should not be penalized for the business to be carried out by the respondent at the said premise, which the appellants had no knowledge.

[22] In awarding the sum of RM97,200 as general damages, the SAR stated this to be the loss of profits suffered by the respondent. In coming to this conclusion, the SAR took the income as stated in those assessments and added up another 20% and he arrived at the figure of RM97,200 as loss of profits. Evidence shows that the respondent continued his business of selling clothes at the old shop. When the respondent stated that the assessments were his income from his business of selling clothes, he did not stop his business of selling clothes. As such, the expected loss of profit could not be the whole of the income shown in those assessments plus 20%, but should be 20% of the income shown in those assessments. Again, we find that the SAR had committed another error.

[23] Another significant point to be considered here is the fact that the respondent knew soon after signing the agreement that the said premise were not available due to the fact that the existing tenant of the said premise refused to move out and hand over vacant possession. Instead of terminating the agreement, he said he was willing to wait and he forwarded his monthly rentals to the appellants which the appellants refused to accept. In our view, that was a clear indication that the premise was not available. Instead of terminating the agreement immediately, he waited for a year and then claimed for loss of profits for three years. The respondent knew that his business of selling clothes was not affected because he continued to carry on that business in the other outlet. In our view, the respondent could have minimized his losses if he had taken steps to terminate the agreement as soon as it was made known to him that the premise was not available. He waited in order to justify his claims of loss of profits for three years. We are of the view that he is not entitled to do that.

[24] For the above reasons, we are of the view that the respondent is not entitled to the claim for loss of profits. Even assuming that he is entitled to loss of profits, we find that there was no evidence to support his claim for loss of profits.

[25] The award of RM97,200 as general damages which the SAR found as loss of profits should be set aside.

Wasted expenditure because of the breach (special damages)

[26] The SAR awarded the respondent the sum of RM17,200 as special damages. In assessing the damages, the SAR took into consideration the preparation by the respondent to move into the said premise. The respondent in his evidence stated that in preparation to move into the said premise he ordered some furniture and mannequins. For those he produced the invoices and the sales order. The invoices and sales order clearly show the amount exceeded the sum of RM 17,200.

[27] In his decision, the SAR stated that in respect of special damages he would only award damages in respect of the purchase of furniture which was supported by the invoice dated 18 October 1991. The amount stated therein. He did not allow damages in respect of the purchase of mannequins because it could be used by the respondent in the other outlet from which he was carrying on his business at that time. He did not allow the damages in respect of purchase of a cash register because the respondent admitted using that in the other outlet. The SAR awarded the sum of RM17,200 as special damages to the respondent.

[28] On appeal, the learned judge allowed the appeal by the appellants. The special damages were then deleted from the award given to the respondent. Reading the judgment of the learned judge we fail to find the reason for him disallowing the special damages. It is obvious that he did not dismiss that award because of election. For the above reasons, we find that the learned judge had erred in disallowing the award on special damages. We have examined the record in respect of the award by the SAR for wasted

expenditure and we found that the SAR did not commit any error in awarding RM17,200 as special damages.

[29] For the above reasons, we reinstated the award of RM17,200 as special damages to which the respondent is entitled to. The order of the learned judge m disallowing the special damages of RM17,200 is hereby set aside and the award by the SAR in respect of special damages is reinstated.

Election

[30] The last issue raised by the appellants was the issue of election. It was contended by the appellants that in a claim for damages for breach under a contract, a person who suffered from the breach could claim either damages for loss of profits (general damages) or the damages in preparation of the performance of the contract or wasted expenditure (special damages). He could not get both but would be entitled to only one. Apparently, the authorities supported the contention of the appellant. In *Ismail v Haji Taib*, Suffian FJ (as he was then) delivering the judgment of the Federal Court at p 260 stated:

> As regards damages, as has already been stated the plaintiff claimed both special damages and general damages. Under special damages he claimed a sum of $1,224, the proceeds at $85 *per kuncha* of the padi which he estimated he would have harvested less the amount of padi he would have had to give the landlord by way of rent. The trial president allowed this claim though there was no evidence to show that the estimate was reasonable. Even if the estimate was reasonable, the plaintiff should not have been awarded the full sum claimed ($1,224), because there should be deducted from it what he would have had to spend on producing the estimated amount of padi. Here there was no evidence to suggest that the plaintiff had spent any money on the padi field, the evidence being merely that he had prepared the land for planting. The cost of preparing the land was assessed by the learned appeal judge at $500, which was also the figure assessed by the trial president as general damages. We think it reasonable to award the plaintiff by way special damages the sum of $1,224 less $500, the assessed cost of preparing the land. In this connection we would refer to the following passage from the judgment of Lord Denning MR in *Anglia Television Ltd v Reed* [1971] 3 All ER 690:
>
> > '... It seems to me that a plaintiff in such a case as this had an election; he can either claim for his loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits — or if he cannot prove what his profits would have been — he can claim in the alternative the expenditure which has been thrown away, that is, wasted by reason of the breach. That is shown by *Cullinane v Britist 'Rema' Manufacturing Co Lid* [1953] 2 All ER 1261, at pp 1264, 1265; [1954] 1 QB 292, at pp 303, 308.'

[31] The appellants' counsel submitted that in view of the principle stated above, the respondent should have made an election before the SAR or the learned judge. He failed to do so, and as such it is for the court to decide which of the damages to be awarded to the respondent. The respondent's counsel contended that the respondent had made the election in the court below. From the record, we could not find any election being made by the respondent. It could not be made before the SAR because it is clear from the notes that the respondent insisted on both damages be paid to him. It could not be made before the learned judge because nothing was mentioned

about the election in his judgment. When the learned judge set aside the award by the SAR in respect of special damages, he did it not because of the election but because there were no sufficient evidence to prove the special damages. As such we agreed with the appellants' counsel that no election was made by the respondent. Even though the respondent did not make any election, it is of no consequence in this appeal. We have found that the respondent failed to prove his claim for loss of profits (general damages) arising from the breach. The respondent is only entitled to the claim for the wasted expenditure expended by him (special damages) due to the breach. Thus, no election is necessary in the present appeal.

Conclusion

[32] Our decision in respect of this appeal are as follows:

(1) The claim by the respondent in respect of loss of profits (general damages) is hereby dismissed. The award of RM97,200 by the SAR in respect of this and affirmed by the learned judge is set aside.

(2) The claim by the respondent in respect of wasted expenditure (special damages) is hereby allowed. The award of RM 17,200 made by the SAR in respect of this and was disallowed by the learned judge is hereby reinstated and to be awarded to the respondent.

(3) Each party is to bear its own costs in respect of this appeal and the appeal before the learned judge.

(4) The deposit is to be refunded to the appellants.

Appeal by the appellants allowed in respect of general damages and award on special damages reinstated.

Reported by Sally Kee